DRAFTING ARBITRATION CLAUSES IN CONTRACTS

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Broad Clause v. Narrow Clause

The broadest possible clause is one which requires arbitration of "all claims and controversies between the parties" or "any transaction involving the parties" and adding "whether such transaction arose prior to or subsequent to the date hereof." In *Frederick v. First Union Securities, Inc.,* 100 Cal App 4th 694 (2002), a clause of that nature led to arbitration of a dispute even though the underlying contract did not contain an arbitration clause because the parties had entered into another contract which contained an arbitration clause with this language.

A clause requiring arbitration of "any disputes arising hereunder" is narrower than one requiring arbitration of "any disputes arising out of or relating to this agreement" *Mediterranean Enterprises Inc v Ssangyong,* 708 F 2d 1458, 1464 (9th Cir 1983). Clauses that provide for arbitration of any disputes "arising out of or relating to this agreement" or "arising in connection with" will be interpreted broadly. *Simula Inc v Autoliv Inc,* 175 F 3d 716, 720 (9th Cir 1999); *Homestake Lead Co. v Doe Run Resources Corp,* 2003 US Dist LEXIS 18005 (ND Cal 2003); *Lozano v AT&T Wireless,* 216 F Supp 2d 1071, 1078 (CD Cal 2002). Arising "as to" is "midway in the continuum". *Fairchild v National Home Insurance Co,* 2001 US App LEXIS 19487 (9th Cir 2001).

In *Bischoff v DirecTV, Inc,* 180 F. Supp. 2d 1097, 1106 (CD Cal 2002), a clause that required arbitration of "any claim either of us asserts….relating to the agreement…or your service" was broad enough to require the arbitration of an antitrust claim filed by plaintiff.

Inclusion of the phrase "relating to" can result in the arbitration of disputes arising from a contract which does not have an arbitration clause but has a relationship with a contract that does have an arbitration clause. *Oakland Alameda County Coliseum Authority v CC Partners,* 101 Cal App 4th 635 (2002).

Arbitration Clause in Separate Document

The fact that the arbitration clause is not in the agreement signed by the parties but in a separate document does not necessarily make the arbitration clause unenforceable. All that is required is that the incorporation be clear and unequivocal and that the plaintiff could easily locate the incorporated document. *Wolfschlager v Fidelity National Title Insurance Co,* 111 Cal App 4th 784, 791 (2003); *cf. Harper v Ultimo,* 113 Cal App 4th 1405 (2003).

Venue

JAMS and AAA will administer the case from the office closest to the site of the arbitration. Thus, if there is a preference for a particular office of either of these providers, a venue should be listed in the agreement. In addition, both the list of arbitrators sent to the parties by these providers will be based on the site of the arbitration.

The state in which venue is located will have jurisdiction if a petition to compel arbitration is necessary. Otherwise, jurisdiction is based on the general rules relative to civil actions.

The arbitration act in the state in which venue is located will apply and this means that such act will determine the procedural rules for the arbitration. *Allied Bruce-Terminix Cos v Dobson,* 513 US 265 (1995); *Rosenthal v Great Western Financial Securities Corp,* 14 Cal . 4th 394 (1996). Procedural issues include arbitrability, issuance of subpoenas, discovery issues, bases for arbitrator disqualification, disclosure, immunity, collateral estoppel, etc.

Vacatur rights could be affected. California is in the minority of states which holds that the vacatur provisions in the Federal Arbitration Act do not preempt the vacatur provisions in the California Arbitration Act. *Siegel v Prudential Insurance Co,* 67 Cal App 4th 1270, 1280 (1998). This is particularly significant because manifest disregard of the law is not ground for vacatur in California. *Moncharsh v Heily & Blase*, 3 Cal 4th 1 (1992).

However, in cases where there is no dispute that the Federal Arbitration Act preempts the California Arbitration Act, the California act will not apply merely because the parties choose California as a venue. *Certain Underwriters at Lloyd's London v Argonaut Insurance Co,* 264 F Supp 2d 926, 933 (ND Cal 2003).

There is a risk that the venue selection clause might not be enforced if it is unconscionable. *Patterson v ITT Consumer Financial Corp,* 14 Cal App 4th 1659 (1993)(California borrowers of small loans not required to arbitrate in Minnesota); *Bolter v Superior Court,* 87 Cal App 4th 900 (California franchisee not required to arbitrate dispute with franchisor in Utah); *Brower v Gateway 2000 Inc,* 676 NYS 2d 569 (App Div 1995) (arbitration of warranty dispute before the ICC Chamber of Commerce denied because it is an unduly expensive forum)*; Comb v. PayPal Inc,* 218 F. Supp 2d 1165 (ND Cal 2002) (customers nationwide not required to arbitrate in Santa Clara County when average customer claim amounts to $55); *Wilmot v McNabb,* 269 F. Supp 2d 1203, 1211 (ND Cal 2003)(customers nationwide not required to arbitrate in Colorado, which was the home base of the respondent).

Choice of Law

The choice of California law in the contract can have several repercussions. One important repercussion is Code of Civil Procedure Section 1281.2(c) which authorizes the court to refuse to enforce a contractual arbitration provision if arbitration threatens to produce a result that might conflict with the outcome of related arbitration not subject to arbitration. The "threat" is the mere existence of related litigation and in such event the court has several options which include denying the petition to compel arbitration or staying the arbitration

pending the outcome of the related litigation. In *Volt Info Sciences v Leland Stanford Jr University*, 489 US 468 (1989), the Supreme Court held that this provision is not preempted by the FAA because "parties are generally free to structure their agreements as they see fit" and so while they are free to limit arbitration to certain issues they also can specify the rules under which the arbitration will be conducted.

The Supreme Court appeared to modify *Volt* when it decided *Mastrobuono v Shearson Lehman Hutton,* 514 US 52 (1995). In that case, the plaintiff was an Illinois resident who dealt with an Illinois office of the defendant, a Delaware corporation headquartered in New York. The arbitration agreement contained a New York choice of law clause. The arbitration was held in Illinois and the plaintiff was awarded punitive damages. The defendant argued that the arbitrators did not have the power to award punitive damages because, under New York law, arbitrators cannot award punitive damages. But the Supreme Court held that the contract was ambiguous in that it did not clearly state that New York arbitration law, in addition to its decisional law, applied to the contract.

Notwithstanding *Mastrobuono,* at least one California appellate court decided that it could apply California arbitration law even though the contract made reference only to the law of California, and not specifically its arbitration law. See *Mount Diablo Medical Center v Health Net of California Inc, supra*. In that case, the court used Section 1281.2(c) to deny a petition to compel arbitration, citing *Volt*. The defendant, which had moved to compel arbitration, argued on appeal, citing *Mastrobuono,* that the arbitration law of California did not apply because there was no specific reference to it in the contract. The Ninth Circuit had followed this approach in *Wolsey Ltd v Foodmaker Inc*, 144 F3d 1205 (1998). The court here took a two step analysis in coming up with a different result. First, it held that a broad choice of law clause means that the issues of contract validity, interpretation and enforcement would be resolved under the agreement by California law. The second step is to determine whether the particular provision of state law reflects a hostility to the enforcement of arbitration agreements that the FAA was designed to overcome. The New York law cited in the *Mastrobuono* case was hostile to the enforcement of arbitration agreements because it prohibited arbitrators from resolving punitive damages issues. Section 1281.2(c) does not limit the rights of parties who choose to arbitrate or otherwise discourage the use of arbitration. It merely addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement.

The Ninth Circuit, however, follows *Mastrobuono* and requires a specific reference to a state's arbitration law before it will enforce that law. *Wolsey Ltd v. Foodmaker Inc, supra*; *Sovak v Chugai Pharmaceutical Co,* 280 F3d 1266, cert den 537 US 825 (2002). In view of this split, it would be good practice to insert a specific reference to California arbitration law if one wishes the entire law of California to apply to the interpretation of the contract. On the other hand, if a client is likely to be involved in multiple litigation if a dispute arises under the contract, some of it involving parties not covered by an arbitration clause, and the client wishes to avoid the consequences of Section 1281.2(c), then the choice of law clause should state that the law of California but not its arbitration law shall apply.

Selection of Arbitrators

Provided that the method for selecting arbitrators is fair in a contract with a consumer or employee that contains a mandatory arbitration clause, the agreement can set forth criteria for the background of the arbitrator, e.g., the arbitrator must be an attorney or must have spent a number of years in a particular industry, etc. But if the conditions are so strict that it severely reduces the arbitrator pool, the selection process may be deemed to be unfair because it creates the likelihood of having the same arbitrators repeatedly hear cases involving the same party. The same rule would apply if the provider chosen under the contract only has a limited numbers of arbitrators in the area. *Mercuro v Superior Court,* 96 Cal App 4th 167, 178 (2002) (arbitration forum had only eight arbitrators in the Central District of California). Furthermore, control of who appears on the list should belong to an entity that is independent of the drafter, such as the AAA or JAMS. An arbitration program where all of the arbitrators on the list were chosen by the company, even though the employee had the right to select arbitrators from the list, was ruled to be unfair in *Hooters of America v Phillips,* 173 F 3d 933, 939 (4th Cir 1999). Obviously, arbitrators on the list could believe that they would be removed from the list if they ruled against the company and this created a biased forum.

Unconscionability Generally

There are two types of unconscionability—procedural and substantive. Procedural unconscionability occurs where a party with less bargaining power is presented with a clause that the court deems to be offensive without the opportunity for meaningful negotiation. Hence, it will apply to most adhesion contracts. But the presence of a contract of adhesion is not the sole criterion for establishing procedural unconscionability. A contract which provided that the arbitration would be conducted in accordance with the rules of the Better Business Bureau but which did not attach the rules and hence failed to alert the consumer that such rules severely limited his rights was found to be so oppressive as to constitute procedural unconscionability . *Harper v. Ultimo ,supra*. However, the respondent might not have been aided even if he had attached the rules because the rules were subject to change.

Substantive unconscionability arises from provisions in a contract which reduce the statute of limitations (usually by requiring that any claim be filed within a specific time), limit the damages, or exclude causes of action which the drafter is most likely to bring while including causes of action which the weaker party is most likely to bring. Although unconscionable clauses can be severed, they could also subject the entire agreement to be voided. *Stirlen v Supercuts Inc,* 51 Cal App 4th 1519 (1997); *Armendariz v Foundation Health Psychare Services,* 24 Cal 4th 83, `120-121 (2001); *Graham Oil Co v ARCO Products Co,* 43 F 3d 1244, 1248 (9th Cir 1994); *Circuit City Stores Inc v Adams,* 279 F 3d 889, 892 (9th Cir) cert den 535 US 1112 (2002); *Mercuro v Superior Court, supra*; *Ferguson v Countrywide Credit Industries,* 298 F. 3d 998 (9th Cir 2002); *ACORN v. Household International,* 211 F. Supp. 2d 1160 (ND Cal 2002); *Jaramillo v JH Real Estate Partners Inc* 111 Cal App 4th 394. 405-06 (2003); *Circuit City Stores Inc v Mantor,* 335 F3d 1101 (9th Cir 2003). A contract must be *both* procedurally and substantively unconscionable to be unenforceable. But the two elements need not be present in the same degree. The more substantively oppressive the

contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and vice versa. *Armendariz,* 24 Cal 4th at p 114, *Ingle v. Circuit City Stores Inc,* 328 F3d 1165, 1174 (9th Cir 2003).

However, a contract with the same restrictive and hence substantively unconscionable provisions as the contract in the *Adams* case was enforceable because the employee was given thirty days to opt out by mailing in a simple one page form. *Circuit City Stores Inc v Ahmed,* 283 F 3d 1198, 1199-2000 (9th Cir 2002); *Circuit City Stores Inc v Najd,* 294 F. 3d 1104 (9th Cir 2002). The opt out clause meant that the contract was not procedurally unconscionable and therefore it was enforced, notwithstanding the substantively unconscionable terms. The court found that the terms of the arbitration agreement were clearly spelled out in written materials furnished to the employee and in a videotape and the employee was also advised to consult an attorney during the thirty day period. Hence, the contract was found not to be adhesive. But the same arbitration agreement that was approved in *Ahmed* and *Najd* was found to be unconscionable in *Circuit City Stores Inc v Mantor, supra* at p 1106, because the employer threatened the employee and hence the employee did not have a meaningful ability to exercise the opt out provision.

It should be noted, however, that the program described in *Ahmed* and *Najd* provided that the employee would suffer no negative employment consequences if he or she opted out. In *Hooters of America v Phillips, supra,* the agreement that the court refused to enforce also gave the employee 30 days to opt in or out. However, an employee who opted out would be denied future raises, promotions, or transfers.

A waiting period by itself does not eliminate procedural unconscionability. In *Ingle v. Circuit City Stores Inc, supra* at p 1172, a three day waiting period did not help the employer because the employee still had no meaningful opportunity to negotiate and would not be employed if she chose not to sign it..

Injunctions

Organizations that draft arbitration agreements for dealings with their customers and employees sometimes do not want to arbitrate when it is necessary to request an injunction, such as in suits to enforce covenants not to compete or protect trade secrets. Consequently, they tend to exclude these injunction actions from the arbitration agreement and thus create the risk that the arbitration agreement would be deemed to be unconscionable, as described above. In fact, it is unnecessary to do this. Code of Civil Procedure Section 1281.8(b) states: "A party to an arbitration agreement may file [in court] an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief." Provisional relief includes preliminary injunctions and temporary restraining orders. *O'Hare v. Municipal Resource Consultants,* 107 Cal App 4th 267, 277 (2003).

Fees and Costs

In *Cole v Burns International Security Services,* 105 F 3d 1465, 1485 (DC Cir 1997), the court held that an employee cannot be required to arbitrate employment claims if a condition of employment requires the employee to pay all or part of the arbitrator's fees and expenses. The California Supreme Court appeared to follow *Cole* when it decided *Armendariz, supra,* but it did not go quite all the way. The court stated: "When an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were forced to bring the action in court." *Armendariz, supra,* at pp 110-11.

Hence, the rule of thumb in California is that the agreement will be held to be substantially unconscionable in claims covered by *Armendariz* where the employee is required to pay any fee that is in excess of what that party would be required to pay in court. Thus, an agreement which capped the employee's filing fee at $125, called for the employer to pay all of the first day's hearing costs, and then required the parties to split the hearing costs for the remaining days (with discretion given to the arbitrator to relieve the prevailing party of all fees) was found to be unconscionable because the employee could be liable for costs in excess of court fees. *Mercuro v Superior Court, supra* at pp 181-2; *Ferguson v Countrywide Credit Industries, supra.* See also *Ingle v. Circuit City Stores Inc, supra* at p. 1178. There was an interesting twist in *Ingle.* The employer required the employee to pay a $75 "filing fee" *to the employer* in order to initiate the arbitration. The court was not impressed by a requirement that the employee pay the employer for the privilege of suing the employer. Subsequently, Circuit City amended its form arbitration contract by allowing the fee to be waived. But the amendment did not pass muster because Circuit City vested in itself the sole discretion to consider applications for waiver. *Circuit City Stores Inc v Mantor, supra* at p 1109. The court added that the provision might not have been considered to be one sided if the discretion to waive the fee were assigned to a disinterested third party.

It is unclear how far the reach of *Armendariz* extends.The court seemed to say that the fee splitting bar applied only to the arbitration of statutory claims. *Armendariz* involved discrimination claims and so it clearly covered claims alleging violation of the federal and state antidiscrimination statutes. However, the rule was extended by the Supreme Court to include common law claims alleging violation of public policy. *Little v Auto Stiegler Inc* 29 Cal 4th 1064, 1081, cert den ____US___ 2003 US LEXIS 5591 (2003).

In *Mercuro v Superior Court, supra* at pp. 180-1, the court stated that the rule should apply to the enforcement of rights under any statute enacted "for a public reason". The statutes involved in *Mercuro* were Section 970 of the Labor Code, which prohibits employers from misrepresenting the terms and conditions of employment to induce a person to change residences to take a job, and Section 230.8 of the Labor Code, which prohibits an employer from discriminating its employees for taking time off to participate in their children's school activities.

In two recent decisions, California Courts of Appeal have applied *Armendariz* to non-statutory claims. *McManus v CIBC World Markets Corp,* 109 Cal App 4th 76, 93 (2003); *Jaramillo v JH Real Estate Partners Inc, supra.*

In *Gutierrez v Autowest Inc,* 114 Cal App 4th 77, (2003), the court found that a consumer contract which did not contain a method by which the consumer could gain relief from unaffordable fees was unconscionable. Arbitration was to be conducted under AAA rules, which only provided for fees to be reduced or deferred if not affordable and did not provide any criterion for lack of affordability.

The Ninth Circuit made no distinction between statutory and other claims when it struck a fee splitting provision. In *Circuit City Stores Inc v Adams, supra,* it held that a fee allocation scheme alone would render an arbitration agreement unenforceable. This rule was extended to consumer contracts. *AT&T Inc v Ting,* 319 F 3d 1126, 1151 (9th Cir), cert den ____US___, 2003 US LEXIS 5506 (2003). See also *ACORN v Household International Inc, supra; Comb v PayPal Inc, supra.*

Fee splitting supplies the substantive unconscionability leg to a contract that is ultimately determined to be unconscionable. But, as noted above, a contract must also be procedurally unconscionable to be unenforceable. Thus, a fee splitting provision in a contract negotiated between equals is probably enforceable.

Appeal to Second Arbitrator

On several occasions, the Courts of Appeal have found arbitration clauses which permitted an appeal to a second arbitrator or to a judicial forum if the award exceeded a specified amount to be unconscionable because there was little likelihood that the stronger party would be a claimant and so the clause only affected the weaker party. *Benyon v Garden Grove Medical Group,* 100 Cal App 3d 698 (1980); *Saika v Gold,* 49 Cal App 4th 1074 (1996); *Fittante v Palm Springs Motors,* 105 Cal App 4th 708 (2003). In *Little v Auto Stiegler Inc, supra* at pp 1072-4, where the threshold for the second appeal was $50,000, the stronger party (an employer) attempted to distinguish these cases on the ground that it could be a claimant, e.g., it might sue an employee for a trade secret violation. But the Supreme Court rejected the argument. It noted that, from a claimant's perspective, the decision to resort to an arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the claimant estimated that the potential value of the claim was substantial and the arbitrator ruled that it would take nothing because of an erroneous understanding of a point of law, then it would be rational for the claimant to appeal. Thus, the $50,000 threshold inordinately benefited respondents.

Discrimination Claims

In *EEOC v Luce Forward Hamilton & Scripps*, 341 F. 3d 742 (9th Cir 2003), the Circuit reversed its prior holding in *Duffield v Robertson Stephens & Co,* 144 F 3d 1182 , cert den 525 US 982 (1998) that the Civil Rights Act of 1991 barred predispute agreements to

arbitrate Title VII claims. Nevertheless, practitioners will still have to deal with the decision in *Prudential Insurance Co of America v Lai,* 42 F 3d 1299 (9th Cir 1994) cert den 516 US 812 (1995), where the court held that there had to be a "knowing waiver" of a Title VII claim before the arbitration agreement can be enforced. California courts have declined to follow the *Lai* decision. *Brookwood v Bank of America,* 45 Cal App 4th 1667 (1996); *Cione v Foresters Equity Services,* 58 Cal App 4th 625 (1997). But if there is diversity of citizenship between the parties, a motion to confirm or vacate might be brought in or removed to a district court in the Ninth Circuit where *Lai* would be applied. Thus, it would be good practice to spell out in the agreement that it applies to Title VII claims. So far, the Ninth Circuit has limited the *Lai* holding to Title VII claims. *Kuehner v Dickinson & Co,* 84 F 3d 316 (9th Cir 1996); *Renteria v Prudential Insurance Co of America,* 113 F 3d 1104 (9th Cir 1997).

Modification

Employment arbitration agreements are signed by both the employer and employee and often contain a provision that the agreement can only be modified by a document containing the signature of the employee and an authorized officer of the employer. Such a provision can be helpful in making the contract enforceable because courts frown on provisions which give the stronger party the unilateral right to modify. See *Ingle v Circuit City Stores Inc, supra* at p 1179. However, the provision can also be a problem if the employer wishes to make a company wide modification of contract, even if the modification is to the employee's benefit. Thus, in *Ferguson v Countrywide Credit Industries, supra,* a modification of the standard contract that eliminated all arbitration fees that would be borne by the employees which was sent to the employees by email was held to be ineffective where the contract could only be amended by the signature of the parties.

Contract Provision Requiring Arbitrator to Follow the Law

California courts will not enforce a provision which requires the arbitrator to issue findings of fact and conclusions of law and permits vacatur if the decision is erroneous. But they have disagreed whether the provision can be severed. In *Crowell v Downey Community Hospital Foundation,* 95 Cal App 4th 730 (2002), the court held that an arbitration agreement that contained such a provision was void and unenforceable. But in *Oakland-Alameda County Coliseum Authority v CC Partners, supra,* which involved an arbitration agreement with a similar provision, the court merely refused to hear an argument that the arbitrator committed errors of law. The court in *Oakland-Alameda County* stated that it did not disagree with the primary holding in *Crowell* but distinguished that case on the ground that the *Crowell* was not reviewing a judgment confirming an arbitration award but instead was reviewing the sustaining of a demurrer to a complaint, filed prior to arbitration, seeking declaratory relief. Furthermore, the *Crowell* court did not have to consider a broad severability clause, which was present in *Oakland-Alameda County.* The Ninth Circuit will also refuse to enforce such a provision but it allows severability. *Kyocera Corp v Prudential-Bache Trade Services,* 341 F3d 987, 1002 (9th Cir 2003).

Restriction on Class Actions

In *Szetela v Discover Bank,* 97 Cal App 4th 1094, 1101-02 (2002), cert den 537 US 1226 (2003) the court struck a provision which limited the customer's rights to filing an individual claim in arbitration, thus barring the customer's ability to bring a class action. The clause was found to be procedurally and substantively unconscionable and the court rejected Discover's claim that there was no unconscionability because the class action bar also applied to Discover. The court was not very impressed by this argument, noting that it was highly unlikely that Discover would bring a class action against its cardholders. It added that to allow litigants to contract away the court's ability to use a procedural mechanism that benefits the court system as a whole is no more appropriate than contracting away the right to bring motions in limine or seek directed verdicts. It also violated public policy by prohibiting any effective means of litigating Discover's business practices because most claims would be small ($29 in this case) and hence would not be brought. See also *ACORN v Household International, Inc, supra*.

In *Discover Bank v Superior Court,* 105 Cal App 326 (2003), another appellate court interpreted the same contract as the *Szetela* court did and upheld the class action waiver. It thought that the *Szetela* court erred in focusing on unconscionability rather than on federal preemption. If a state statute requiring a nonwaiveable judicial forum for resolution of consumer disputes must give way to Section 2 of the FAA, it necessarily must follow that a state judicial policy precluding classwide arbitration waivers must also give way to Section 2. The California Supreme Court granted review of the *Discover Bank* decision and hence it was depublished and cannot be cited.

The Ninth Circuit is in the camp of the *Szetela* court. In *AT&T Inc. v Ting, supra,* the court found a class action waiver to be unconscionable. It disagreed with the analysis in *Discover Bank*, holding that because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening Section 2. See also *Ingle v Circuit City Stores Inc, supra* at pp. 1175-6.

Normally, there is no prohibition against preventing the *consolidation* of claims, e.g., where several customers or employees bring a single action arising from separate but related transactions. Arbitrators and courts do have the power to consolidate arbitration claims but this can be prevented by a clause in the arbitration agreement which prohibits consolidation. But in *Comb v PayPal, supra,* the court struck a provision which prohibited the joinder and consolidation of claims. However, this case did involve a class action and the agreement itself was unconscionable for a variety of reasons. It is possible that the court came to the conclusion that it did because of the totality of the circumstances.

Cancellation

In *Hooters of America v Phillips, supra* at p. 939, the court deemed an arbitration agreement to be unfair because the employer, but not the employee, had the right to cancel or modify the agreement on 30 days' notice to the employee. The court noted that the agreement did not

even prohibit the employer from changing the rules while a case was pending. However, this ruling probably would not prohibit an employer from having the unilateral right to cancel the agreement if the right to cancel did not apply to pending arbitrations. The notice period probably should be longer than 30 days and the right to cancel could not be limited to arbitration agreements with individual employees (unless they were reassigned to an area where the employees did not have arbitration agreements) but would apply to cancellation of the entire arbitration program.

Severability

It is a good idea to provide for a severability provision in the agreement on the chance that a particular aspect of the agreement will be found to be unenforceable. This would include a provision that would give the court the power to reform the agreement in order to preserve arbitration. The same power could also be given to the arbitrator, but there is some risk to this because the reforming might be performed by a runaway arbitrator. Severability or reformation clauses, however, are no guarantee that a court will sever or reform if it finds that the unconscionable provisions pervaded the entire agreement. See *Armendariz, supra,* at p. 127; *Circuit City Stores Inc v Adams, supra,* at pp 895-6.

Discovery

It is permissible to limit discovery in an arbitration agreement. *Gilmer v Interstate/Johnson Lane Corp,* 500 US 20, 31 (1991). However, it would be a mistake to preclude all discovery. For example, in *Armendariz, supra*, at pp. 104-06, the court held that when an employer agrees to arbitrate FEHA claims, it impliedly consents to discovery. In addition, Rule 7 of the AAA's National Employment Rules provides that "the arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute". However, since discovery can be limited, it may be possible to spell out the limitations, e.g., a specified limit on the number of depositions or interrogatories provided that the limitation applies to all parties to the arbitration. *Mercuro v Superior Court, supra* at p. 183*; Ferguson v Countrywide Credit Industries, supra.*

Residential Lease Agreements

Civil Code Section 1953(a)(4) precludes a residential lease agreement from including any modification or waiver of a tenant's procedural rights in litigation in any action involving his or her rights as a tenant. In *Jaramillo v JH Real Estate Partners Inc, supra* at pp 404-05, the court held that this provision prohibited the tenant from waiving, in advance, in a residential lease agreement the right to have a jury trial in any affirmative action against the landlord that involved the tenant's rights and obligations. Since the waiver of a jury trial is inherent in an arbitration agreement, the court also held that Section 1953(a)(4) bars the inclusion of arbitration clauses in residential lease agreements. However, Civil Code Section 1942.1 permits arbitration of "tenantability" disputes. Consequently, the court reasoned that nothing prevented the landlord and tenant from entering into an arbitration agreement that was not

contained in the lease, provided that the arbitration clause adhered to the requirements set forth in Section 1942.1.